

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Midwest Independent Transmission
System Operator, Inc.**

)
)

Docket No. ER02-108-003

**REQUEST FOR REHEARING
OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.713, the Illinois Commerce Commission ("ICC") hereby respectfully submits its Request for Rehearing of the Commission's Order issued May 31, 2002, in the above-captioned proceeding.¹

I. BACKGROUND

On October 15, 2001, the Midwest ISO filed its Market Monitoring Plan with the Commission. On November 19, 2001, the ICC submitted Comments on the Midwest ISO's filed Market Monitoring Plan. On December 20, 2001, the Commission issued an Order accepting the Midwest ISO's Market Monitoring Plan conditioned on a review of the Market Monitoring Contract. The Commission stated, "Without knowing the details of the contract we cannot be sure that the IMM [independent market monitor] is truly independent of the RTO."² On January 18, 2002, the ICC filed a Request for Rehearing of the Commission's December 20 decision to accept the Market Monitoring Plan.

¹ *Midwest Independent Transmission System Order, Inc.*, 99 FERC ¶ 61,237 (2002) (*hereinafter*, "May 31 Order").

² *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001) (*hereinafter*, "December 20 Order").

On January 17, 2002, the Midwest ISO filed with the Commission its Market Monitoring Contract with Potomac Economics in compliance with the December 20 Order. On February 7, 2002, the ICC filed its Comments on the Market Monitoring Contract.

On January 28, 2002, the Midwest ISO re-filed its Market Monitoring Plan with the Commission in further compliance with the December 20 Order. On February 20, 2002, the ICC submitted Comments to the Commission on the Midwest ISO's re-filed Market Monitoring Plan.

On May 31, 2002, the Commission issued an Order addressing the Midwest ISO's Market Monitoring Contract. This instant ICC Request for Rehearing is in response to that May 31 Order.

As of the date of this ICC filing, the Commission has not acted on the ICC's Request for Rehearing of the December 20th Order's acceptance of the Market Monitoring Plan. Nor has the Commission acted on the Midwest ISO's re-filed Market Monitoring Plan or the ICC's Comments on that re-filed plan

II. SPECIFICATION OF ERROR

- A. The Commission erred in assuming that independence of the Market Monitor from the Midwest ISO can be ascertained from an examination of the specific terms in the Contract between the Market Monitor and the Midwest ISO. Rather, if independence of the Market Monitor from the Midwest ISO is to be obtained, an alternative market monitoring contract arrangement must be devised as recommended by the ICC in its November 19, 2001 Comments. Accordingly, the Commission should rehear its decision in the May 31 Order directing the Midwest ISO to "renegotiate and file a revised Retention Agreement [Contract]."³
- B. If the Commission is not persuaded by the ICC's argument of Issue A, then the Commission should find that the May 31 Order erred in not directing that the Market Monitoring Contract between the Midwest ISO and Potomac Economics be modified to: (1) eliminate the Midwest ISO's unilateral authority to establish the overall market monitoring budget allowance; and (2) eliminate the "agency" relationship owed by the Market Monitor to the Midwest ISO.

³ May 31 Order, at 1.

III. ARGUMENT

A. The Premise that it is possible to ascertain independence of the Market Monitor from the Midwest ISO through examination of the specific terms of the Contract between the Market Monitor and the Midwest ISO is erroneous

The ICC supports the Commission's objective in the May 31 Order that the Market Monitor be "truly independent" of the Midwest ISO.⁴ Accordingly, the ICC recommends that the Commission reconsider the premise of its May 31 Order that, by reviewing the Contract terms between the Midwest ISO and Potomac Economics (as the Market Monitor), the Commission can ascertain that the Market Monitor is independent of the Midwest ISO. The premise on which the May 31 Order was constructed is erroneous.

In its November 19, 2001 Comments on the Market Monitoring Plan, the ICC identified several problems regarding the contractual relationship between the Midwest ISO and the Market Monitor that would preclude the Market Monitor from being independent of the Midwest ISO. In particular, the ICC argued that the existence of a contractual relationship between the Midwest ISO and the Market Monitor, in and of itself, signifies the absence of independence between the Market Monitor and the Midwest ISO.⁵ The ICC further argued that market monitoring is a public interest function that should be responsive to, and overseen by, the entities responsible for representing the public interest—in this case, both the Commission and the State commissions.⁶ Consequently, it is the existence of the contractual relationship between the Midwest ISO and the Market Monitor, in and of itself, that prevents the Market Monitor from acting independently of the Midwest ISO. Given that it is not possible to design acceptable contract terms between the Midwest ISO and the Market Monitor to achieve the goal of true independence of the Market

⁴ *Id.*, at 2.

⁵ November 19 ICC Comments, at 4-14.

⁶ *Id.*

Monitor from the Midwest ISO, the Commission's efforts to establish an acceptable level of independence through the examination of the specific contract terms are misplaced.

The Commission's decision in the May 31 Order to reject the Midwest ISO's Market Monitoring Contract compliance filing is appropriate. However, the Commission should rehear its decision Order directing the Midwest ISO to "renegotiate and file a revised Retention Agreement [Contract]." ⁷ As stated above, such a directive is in error because independence of the Market Monitor from the Midwest ISO cannot be achieved under any direct contractual relationship. Rather, to obtain the objective of independence, an alternative market monitoring contract arrangement must be devised as recommended by the ICC in its November 19, 2001 Comments.

B. If the Commission is not persuaded by the ICC's argument of Issue A, then the Commission should find that the May 31 Order erred in not directing the Midwest ISO and Potomac Economics to modify the Market Monitoring Contract to: (1) eliminate the Midwest ISO's unilateral authority to establish the overall market monitoring budget allowance; and (2) eliminate the "agency" relationship owed by the Market Monitor to the Midwest ISO.

1. The Midwest ISO Should Not Have Unilateral Authority to Establish the Overall Market Monitoring Budget Allowance

In its February 7, 2002 Comments, the ICC argued that the Market Monitoring Contract improperly allows the Midwest ISO to establish the overall market monitoring budget level.⁸ The ICC argued that the absence of an opportunity for input by interested parties in the establishment of the overall market monitoring budget allowance would allow the Midwest ISO to establish a market monitoring budget at levels that could prevent the Market Monitor from effectively monitoring the behavior and performance of the Midwest ISO itself.⁹ The ICC further argued that transmission customers who will ultimately pay for market monitoring

⁷ May 31 Order, at 1.

⁸ ICC Comments, at 5-6.

⁹ *Id.*

through their transmission rates, and public interest representatives such as the ICC, should have a role in establishing the overall market monitoring budget allowance.¹⁰

The May 31 Order directed the Midwest ISO to revise and re-file the Market Monitoring Contract. The Order states that the revised and re-filed Contract should contain the “terms of compensation for the IMM.”¹¹ In issuing this directive, the Commission failed to consider that allowing the Midwest ISO to unilaterally establish the overall level of compensation for the Market Monitor would enable the Midwest ISO to control the Market Monitor and thus prevent the Market Monitor from acting independently. Accordingly, the Commission should reconsider its decision in the May 31 Order on this issue and direct the Midwest ISO to initiate an open process to decide on the proper level of compensation for the Market Monitor.

Furthermore, the ICC believes that the Commission should use its discretion to review the overall market monitoring budget to ensure that the budget: (1) is sufficient to meet the market monitoring needs; (2) is not excessive, as to be unjust or unreasonable; and (3) is established in such a way, and at such a level, as to prevent control of the Market Monitor by any party (including the Midwest ISO) and to permit the Market Monitor to act independently.

2. The Market Monitor Should not be Permitted to Act as an “Agent” of the Midwest ISO—Rather, the Market Monitor Should Act, at all times, in the Public Interest

In its February 7, 2002 Comments, the ICC argued that the Market Monitoring Contract improperly requires the Market Monitor to act as an agent of the Midwest ISO. The ICC argued that such an agency relationship could jeopardize the Market Monitor’s ability to act independently of the Midwest ISO and could undercut the faith in the Market Monitor’s

¹⁰ *Id.*

¹¹ May 31 Order, at 8.

impartiality, in both decisions and actions, by market participants and public interest representatives.¹²

The ICC further argued that it is improper for the Market Monitoring Contract to impose on the Market Monitor the requirement to perform investigations and analyses or produce additional reports at the Midwest ISO's request.¹³ Specifically, the Market Monitoring Plan provides that any interested person may request the Market Monitor to perform an investigation and that the Market Monitor shall have discretion to conduct such an investigation.¹⁴ The ICC argued that Market Monitor's discretion to perform an investigation should equally apply to the Midwest ISO and that the Midwest ISO should not be entitled to special treatment in this regard from the Market Monitor.¹⁵ However, the Market Monitoring Contract contains explicit language requiring the Market Monitor to accord the Midwest ISO special treatment by obligating the Market Monitor to conduct whatever "investigations and analyses" may be desired by the Midwest ISO and obligating the Market Monitor to "produce additional reports" at the request of the Midwest ISO's management or Board of Directors.¹⁶ The Commission's May 31 Order did not address the language in the Market Monitoring Contract providing for the Market Monitor to provide advisory and consulting services to the Midwest ISO. The ICC requests that the Commission address that question. In its February 7, 2002 Comments, the ICC argued that it is improper for the Market Monitor to serve in an "advisory" role to the Midwest ISO and for the Midwest ISO to require the Market Monitor to stand ready to perform consulting services for the Midwest ISO, either inside or outside the regular market monitoring budget cap.¹⁷ The ICC

¹² ICC Comments, at 8-9.

¹³ ICC Comments, at 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See* Contract Attachment A, at 2.

¹⁷ ICC Comments, at 8 and 11.

further argued that such a relationship could easily create conflicts of interest for the Market Monitor between its public interest responsibilities in market monitoring and its private interests in conducting profitable consulting work. The ICC also noted that the so-called Conflicts of Interest Policy (Attachment B) of the Contract is specifically written so as not to constrain the Midwest ISO and the Market Monitor from entering into any type of professional relationship either inside or outside of the market monitoring budget allowance.¹⁸

Moreover, the Commission's May 31 Order did not address the Contract provisions requiring the Market Monitor to testify on behalf of the Midwest ISO. The Contract contains language that requires the Market Monitor to testify on behalf of the Midwest ISO in support of FERC filings by the Midwest ISO.¹⁹ In its February 7, 2002 Comments, the ICC argued that the Market Monitor should not exist to serve the litigation needs of the Midwest ISO. Engaging in such activities could result in the Market Monitor compromising the performance of its public interest responsibility.²⁰ Accordingly, the Commission should reconsider this issue and direct that the Contract be further revised to eliminate this testimony requirement.

As these points demonstrate, the May 31 Order did not eliminate the "agent" relationship imposed on the Market Monitor by the Contract and not establishing a proper independent relationship between the Market Monitor and the Midwest ISO. The ICC explained in its Comments on the Market Monitoring Contract that,

The Market Monitor should not work, and should not be perceived to be working, on behalf of the Midwest ISO. Rather, market monitoring is a public interest function and the Market Monitor should, at all times, be perceived to issue "advice" in the public interest. In short, the Market Monitor should not act as an agent of the Midwest ISO nor should it be incented to act as an agent of the

¹⁸ *Id.*, at 13.

¹⁹ See Contract Attachment A, at 2.

²⁰ ICC Comments, at 12.

Midwest ISO. The Midwest ISO should be free to hire its own agents to perform that role.²¹

However, the Market Monitoring Contract establishes an “agent” relationship between the Market Monitor and the Midwest ISO by: (1) obligating the Market Monitor to perform analyses and issue reports at the request of the Midwest ISO; (2) establishing the Market Monitor in an “advisory” role to the Midwest ISO; (3) allowing or requiring the Market Monitor to do consulting work on behalf of the Midwest ISO inside or outside of the market monitoring budget; and (4) allowing or requiring the Market Monitor to testify on behalf of the Midwest ISO in regulatory proceedings. We request that the Commission reconsider these matters.

IV. CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission rehear its May 31, 2002 Order. The Commission should rehear its decision to direct the Midwest ISO to “renegotiate and file a revised Retention Agreement [Contract].”²² Rather, if independence of the Market Monitor from the Midwest ISO is truly to be obtained, an alternative market monitoring contract arrangement must be devised as recommended by the ICC in its November 19, 2001 Comments. In the event the Commission does not eliminate the contractual arrangement between the Midwest ISO and the Market Monitor and replace it with an alternative contractual arrangement as recommended by the ICC in its November 19, 2001 Comments, then the ICC recommends that the Commission direct that the Market Monitoring Contract between the Midwest ISO and Potomac Economics be modified to: (1) eliminate the Midwest ISO’s unilateral authority to establish the overall

²¹ *Id.*, at 8.

²² May 31 Order, at 1.

market monitoring budget allowance; and (2) eliminate the “agency” relationship owed by the Market Monitor to the Midwest ISO.

Respectfully submitted,

/s/ Christine F. Ericson

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Dated: June 19, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 19th day of June, 2002.

/s/ Christine F. Ericson

Christine F. Ericson
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